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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JIMMY GRADY MCANY II Defendant and Appellant.	F062899 (Super. Ct. No. 1426510) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Stanislaus County. Ricardo Cordova, Judge.

Jill M. Klein, under appointment by the Court of Appeal, for Defendant and Appellant.

[*] Before Hill, P.J., Levy, J. and Kane, J.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Wanda Hill Rouzan, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Jimmy Grady McAny was convicted after a jury trial of being a felon in possession of a firearm in violation of Penal Code, section 12021, subdivision (a)(1).[1] Appellant admitted that he had served a prior prison term. The trial court sentenced appellant to a three-year prison term. In this appeal, appellant contends his conviction must be reversed because the trial court failed to instruct the jury with CALCRIM No. 359 on the corpus delicti rule. Concluding the error was harmless, we will affirm.

FACTS

On December 5, 2010, around 2:00 a.m., Modesto Police Officer Michael Hammond and Sergeant Robert Stewart were patrolling the entertainment district in downtown Modesto. Officer Hammond spotted appellant near a nightclub. The officer knew appellant from prior contacts. After confirming appellant was searchable, Officer Hammond told Sergeant Stewart, "Let's contact him to conduct a compliance search." Sergeant Stewart notified dispatch that they were going to contact somebody at 10th and J Streets.

Officer Hammond got out of the patrol car and called out appellant's street name, "J-Mac." Appellant looked at Officer Hammond; his expression was like "a deer in headlights." The officer twice told appellant, "J-Mac, come here." Appellant did not comply but started running northbound on 10th Street. Officer Hammond followed appellant and notified dispatch that he was "in foot pursuit of a male … wearing a black hoodie" and heading "towards the Brenden garage."

When Officer Hammond started chasing appellant, Sergeant Stewart ran back to the patrol car and drove to try to "cut off the escape on 11th Street … on the other side of

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1 Further statutory references are to the Penal Code unless otherwise specified.

the parking garage." The sergeant parked on 11th Street, near the end of 10th Street. As soon as he got out of the patrol car, he saw appellant running out of the parking garage's vehicle exit. He and appellant almost ran into each other on the sidewalk just outside the exit. Sergeant Stewart immediately put appellant at gunpoint. Appellant lay down on the ground and the sergeant handcuffed him.

Sergeant Stewart notified Officer Hammond that appellant was detained. Officer Hammond started retracing appellant's path through the parking garage and contacted two city employees who were working in the garage that night.

Officer John Wesley arrived at the parking garage around 2:05 a.m., as appellant was being handcuffed. Officer Wesley approached Officer Hammond, who asked Officer Wesley to "start backtracking the area to see if something had been tossed." Officer Wesley quickly spotted a firearm inside a gated area between the parking garage and 10th Street Place. One of city employees unlocked the gated area so the officer could retrieve the firearm. The front side of the gun appeared to have been "knocked off" and there was a scuff mark on the back end of the gun. A police identification technician later examined the gun but was unable to lift any fingerprints from it.

The police call log reflected that the entire incident was very brief. Appellant started to run from Officer Hammond at 2:04 a.m., and the gun was found at 2:06 a.m.

When appellant was in the back of the patrol car, he asked Officer Hammond if he could call his mother and girlfriend. Appellant was handcuffed, so the officer dialed his cell phone for appellant and let appellant talk on the speaker phone. Officer Hammond testified that when appellant spoke with his girlfriend, "[h]e told her that he was going to be locked up for a long time, that he asked her to stay with him during this time, and to make all his court appearances, and that he was going to be locked up for a good year."

Kenny Bell, one of the two city employees working in the parking garage that night, testified that he heard a noise around 2:00 a.m. When asked to describe the sound, Bell testified: "A metal like somebody throwing a tin can down, garbage can. Bell looked in the direction of the sound and saw a young African-American man running.

The man ran right past Bell and then lay down on the sidewalk after exiting the garage. At the same time, Bell saw police cars pulling up.

Bell unlocked the gated area for the police to retrieve the gun. Bell had walked through the same gated area 15 minutes earlier and had not seen a gun at that time.

Jeffrey Pytlewitcz, the other city employee working that night, testified that around 2:00 a.m., he "heard a loud cling noise like metal hitting concrete" causing him to turn around. When he turned, he saw an African-American man in a blue hooded sweatshirt running through the garage towards 11th Street. He saw the man run past Bell. As soon as the man got to the street, a police vehicle pulled up and apprehended him.

The Defense

When Officer Hammond talked to Bell after the incident, Bell only reported that he had walked through the gated area at 11:00 p.m., three hours before the incident. Officer Hammond could not recall if the police department ever contacted the registered owner of the gun found in the parking garage.

DISCUSSION

The trial court did not instruct the jury with CALCRIM No. 359 (Corpus Delicti: Independent Evidence of a Charged Crime), nor did appellant request the instruction.[2] Appellant argues the trial court erred because it had a sua sponte duty to instruct the jury with CALCRIM No. 359. Respondent implicitly concedes the trial court had a sua sponte duty to give the instruction but claims any error in failing to do so was harmless. We agree.

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[2] CALCRIM No. 359 provides: "The defendant may not be convicted of any crime based on (his/her) out-of-court statement[s] alone. You may only rely on the defendant's out-of-court statements to convict (him/her) if you conclude that other evidence shows that the charged crime [or a lesser included offense] was committed. [¶] That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed. [¶] The identity of the person who committed the crime [and the degree of the crime] may be proved by the defendant's statement[s] alone. [¶] You may not convict the defendant unless the People have proved (his/her) guilt beyond a reasonable doubt."

"In every criminal trial, the prosecution must prove the corpus delicti, or the body of the crime itself—i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause. In California, it has traditionally been held, the prosecution cannot satisfy this burden by relying *exclusively* upon the extrajudicial statements, confessions, or admissions of the defendant. [Citations.] Though mandated by no statute, and never deemed a constitutional guaranty, the rule requiring some independent proof of the corpus delicti has roots in the common law. [Citation.]" (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168-1169.) "This rule is intended to ensure that one will not be falsely convicted, by his or her untested words alone, of a crime that never happened. [Citations.]" (*Id.* at p. 1169.)

"Error in omitting a corpus delicti instruction is considered harmless, and thus no basis for reversal, if there appears no reasonable probability the jury would have reached a result more favorable to the defendant had the instruction been given. [Citations.] [¶] Of course, as we have seen, the modicum of necessary independent evidence of the corpus delicti, and thus the jury's duty to find such independent proof, is not great. The independent evidence may be circumstantial, and need only be 'a slight or prima facie showing' permitting an inference of injury, loss, or harm from a criminal agency, after which the defendant's statements may be considered to strengthen the case on all issues. [Citations.] If, as a matter of law, this 'slight or prima facie' showing was made, a rational jury, properly instructed, could not have found otherwise, and the omission of an independent-proof instruction is necessarily harmless." (*Alvarez*, *supra*, 27 Cal.4th at p. 1181.)

In this case, independent evidence established the necessary prima facie showing because it permitted a reasonable inference that appellant possessed and discarded the subject firearm as he ran through the parking garage. Bell testified that he had not seen the gun when he passed through the gated area 15 minutes before appellant ran through the garage. Both Bell and Pytlewitcz described hearing a noise of "metal" being thrown

down or hitting concrete, and seeing appellant upon looking in the direction of the noise. Appellant's conduct of running from the police also suggested a consciousness of guilt. We reject appellant's contrary arguments and conclude there was sufficient independent proof of each element of the offense.[3] Thus, as a matter of law, the record contains the requisite prima facie showing, independent of appellant's extrajudicial statements, that he was a felon in possession of a firearm. (See *Alvarez, supra*, 27 Cal.4th at p. 1182.) Accordingly, any error in failing to instruct the jury with CALCRIM No. 359 on the requirement of independent evidence was harmless.

DISPOSITION

The judgment is affirmed.

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[3] The elements of the offense here involved are (1) conviction of a felony and (2) ownership or possession of a firearm (*People v. DePrima* (1959) 172 Cal.App.2d 109, 114). Appellant stipulated at trial that he is a convicted felon.